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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-253

LEMAR TOWING CO., INC.,

Petitioner

versus

FIREMAN'S FUND INSURANCE COMPANY,

Respondent

PETITION FOR CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES
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versus

FIREMAN'S FUND INSURANCE COMPANY,
Respondent

PETITION FOR CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner seeks certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case, and, in support of its petition, respectfully shows:

OPINION BELOW and JURISDICTION

The District Court's opinion is reported at 352 F. Supp. 652. The judgment of the District Court is dated July 19, 1972. The Court of Appeals affirmed, per curiam, at 471 F2d 609, the District Court's opinion. The judgment of the Court of Appeals is dated January 12, 1973. Rehearing and rehearing en banc were denied on June 11, 1973. Jurisdiction of this Court lies under 28 USC 1254(1).

QUESTION PRESENTED

Whether, in a suit by an assured against a marine underwriter to recover for the loss of a sunken inland tug under a marine time

hull policy issued in Louisiana, the underwriter may validly assert as a defense to the suit an alleged breach of an implied warranty of continuing seaworthiness, including a warranty that the crew of the vessel will be qualified in compass navigation, even though the policy as written contains no express warranty of any kind; when Wilburn Boat Co. vs Fireman's Fund Insurance Co., 348 US 310 (1954), requires that state law control policy warranties; and when R.S. 22:628 of the Louisiana Insurance Code, which code applies to marine policies under settled decisions, provides that:

> "No agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be valid unless in writing and made a part of the policy."

The decision has nationwide importance, since the holding

(1) affects every American time hull policy written without warranties of seaworthiness; and enables insurers, notwithstanding coverage of crew negligence under the Inchmaree clauses of such policies, to avoid such coverage on the theory below that incompetence of the master or crew affords a secret defense;

(2) effectually deprives States in the Fifth Circuit of the right to require, by salutary legislation, that insurers doing business in those States reduce their entire agreement with the assured to writing, to avoid fraud and secret defenses; and

(3) unduly militates against the powers of States to enact legislation in the maritime

field. Askew vs American Waterways Operators, Inc., 93 S.Ct. 1590, 41 L.W. 4507 (April 18, 1973).

STATUTE INVOLVED

Louisiana Revised Statutes, Title 22, Section 628:

> "No agreement in conflict with, modifying or extending the coverage of any contract of insurance shall be valid unless in writing and made a part of the policy."
> (Acts 1948, No.195, Section 14.18, reenacted without change, Acts 1958, No. 125).

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Eastern District of Louisiana to recover on a policy of marine insurance. Admiralty and diversity jurisdiction were invoked. Petitioner owned the Tug TRUDY B, a small inland vessel insured by Respondent which issued a marine hull policy containing no requirement that the vessel be maintained in a seaworthy condition, and no provisions as to the qualifications or competence of the crew.

The vessel was, however, seaworthy in her hull and machinery at all times and her good physical condition was proved beyond dispute at trial, and was accepted by the Court.

Shortly after leaving a shipyard where she had received routine hull repair and maintenance, the TRUDY B was dispatched by Petitioner on an inland canal and river

voyage from the Inner Harbor Navigation Canal, New Orleans, eastward in the Gulf Intracoastal Waterway to the Rigolets (an inland pass running north-northwest from Lake Borne into Lake Pontchartrain), thence up the West Pearl River, to return via the same route. Inland use of this type was the vessel's usual employment. The master, Ronald Bearb, who had been recommended to Petitioner as being qualified to act as captain of the TRUDY B, turned out to be unskilled in the use of a compass, but this was unknown to Petitioner at the time he was hired or at the time of the commencement of the voyage in question.

En route up the West Pearl River the TRUDY B grounded, an event covered by the perils clause of Respondent's policy, which grounding caused a hole in the vessel's hull and damage to her screws and propeller shafts which caused her to make water through her stuffing boxes. After telephone discussions with Petitioner's president, Bearb effected emergency repairs, borrowed a pump to supplement the vessel's two pumps, and began the return voyage to New Orleans for shipyard repairs.

Arriving in the Rigolets around midnight, Bearb encountered fog and moored at a railway bridge. The fog began to clear after about half an hour, and he set forth in a westerly direction across the approximately one-mile-wide Rigolets pass, bound for the entrance to the Gulf Intracoastal Waterway. However, the entrance to the Gulf Intracoastal Waterway required rounding Catfish Point, in an area where the channels are winding and mud shoals abound, so when Bearb encountered fog again he attempted to turn about and return to the bridge. Unfortunately, he lost his

way in the fog and darkness, and ran into Lake Borgne, thence into Mississippi Sound where he proceeded in an easterly direction throughout the night.

At dawn the fog cleared and Bearb found that he had traveled as far east as Gulfport, Mississippi. There the TRUDY B encountered an oyster boat which gave Bearb a course heading to New Orleans via the Gulfport Ship Channel. A great quantity of water had leaked into the hull of the TRUDY B during the night, and she was down heavily by the stern. When she entered the choppy waters of the Gulfport Ship Channel she capsized and sank.

The insurer declined liability initially on the sole basis that the vessel had breached the limits of her navigation warranty, which defense the District Court rejected and characterized as lacking in common sense. However, at trial Respondent raised another defense on which, notwithstanding Petitioner's plea of estoppel, Respondent prevailed, namely, that the assured had breached an implied warranty of seaworthiness because the master was unskilled in the use of the compass.

The District Court was of the opinion that because Bearb was not skilled in the use of the compass at the time of the commencement of the proposed inland voyage, Petitioner had failed to make the vessel seaworthy crew-wise; and that seaworthiness of that species was required by an implied warranty in the time hull policy. The Court considered that Bearb, with the use of the compass, should have been able to make it safely through the fog and to New Orleans and a safe berth before sinking.

For purposes of this petition, Petitioner assumes that Bearb was unable to chart a compass course in the Gulf of Mexico. But the question here reduces to the effect, on vessel owners in every State, of the District Court's holding (Addendum A) which was subsequently affirmed per curiam:

> "We conclude that the crew of the TRUDY B, and particularly its captain, was incompetent at the commencement of the voyage, thus rendering the vessel unseaworthy at that and subsequent times and that such unseaworthiness proximately resulted from the owner's neglect in failing to determine the qualification and competence of the crew to man the vessel for the intended voyage before its commencement. We further conclude that such unseaworthiness was the proximate cause of the loss of the TRUDY B. And since the unseaworthiness was caused by the incompetence of the crew, and not by the negligence of the master or crew, the Inchmaree Clause is thus inapplicable."

> "Having so breached the implied warranty of seaworthiness, plaintiff is not entitled to recover."

The courts below declined to consider the effect that Louisiana law might have on the case, because in their view, as stated in the District Court's opinion, the doctrine of implied warranty of seaworthiness is so entrenched in federal law that it cannot be modified by state law. The District Court said (page 21):

"Before reaching the merits of this defense, we must first determine whether the issues raised herein are to be governed by the law of Louisiana or by that of the sea. In Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), the United States Supreme Court held that the regulation of marine insurance should be left to the states. Justice Harlan, in a later case, remarked that '[t]he application of state law in [Wilburn] was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented.' Kossick v. United Fruit Co., 365 U.S. 731, 742, 81 S.Ct. 886, 894, 6 L.Ed. 2d 56 (1961), cf. Irwin v. Egal Star Ins. Co., Ltd., 455 F.2d 827 (5th Cir. 1972). The rule to be followed in the Fifth Circuit is that State law should be applied in the field of marine insurance where there is no controlling federal authority with respect to the specific issue before the court. Fireman's Fund Insurance Co. v. Wilburn Boat Co.,300 F.2d 631 (5th Cir. 1962) (on remand), cert. den. 370 U.S. 925, 82 S.Ct. 1562, 8 L.Ed. 2d 505. Since the standard of seaworthiness is solidly entrenched in federal maritime jurisprudence, Aquirre v. Citizens Casualty Company of New York, 441 F.2d 141, 146 (5th Cir. 1971), we must apply the federal maritime law."

ARGUMENT

a - As to the Non-Existent "Implied Warranty"

In Wilburn Boat Co. vs. Fireman's Fund Insurance Co., 348 US 310 (1954), this Court established the right of the State to enact legislation governing the effect to be accorded warranties in marine insurance policies in the absence of a controlling Federal standard.

When the policy in suit was issued on March 23, 1969, no Federal standard implying a warranty of seaworthiness in a time hull policy was entrenched in the Fifth Circuit, nor would there be any such standard now unless its entrenchment by the instant case is allowed to stand. Both Courts below fell into error in assuming that the earlier case of Aguirre vs Citizens Casualty Company of New York, 441 F2d 141 (CA 5-1971), cert. den., 404 U.S. 829 (1971), stands for the proposition that there is an implied warranty of seaworthiness in every marine policy, for in Aguirre the policy contained "an express warranty of seaworthiness . . . that at the inception of this policy the vessel shall be in a seaworthy condition and, thereafter, during the currency of this policy, the assured shall exercise due diligence to keep the vessel seaworthy, and in all respects fit, tight, and properly manned. equipped and supplied." Aguirre, supra at 143. Thus, the Aguirre decision cannot sustain the implication of such a warranty.

It was erroneous, also, for the District Court below to hold that "the Fifth Circuit recognizes that there exists in a time policy, such as the one sued on herein, an

implied warranty of seaworthiness," citing The Spot Pack (Saskatchewan Government Insurance Office vs Spot Pack), 242 F2d 385 (CA 5-1957); The Sea Pak (Tropical Marine Products vs Birmingham Fire Insurance Co. of Pa.), 247 F2d 116 (CA 5-1957), cert. den., 355 US 903 (1957); and Gulfstream Cargo, Ltd. vs Reliance Insurance Company, 409 F2d 974 (CA 5-1969). Sea Pak certainly does not support this proposition. And in Spot Pack, the Fifth Circuit questioned the so-called "negative" warranty that the vessel should not knowingly be permitted to "break ground in an unseaworthy condition," and inquired "[h]ow this came to be the rule of general acceptance for all Time policies," as it is traceable to Union Insurance Co. of Philadelphia vs Smith, 124 US 405 (1888), which, as pointed out in Spot Pack, "contained not alone an express warranty of seaworthiness, but an express exclusion of losses caused by unseaworthiness or by incompetence of Master and Mariners;" but the Court in Spot Pack decided that it "need not determine whether, and to what extent, the rule should be different for a Time Policy," The Spot Pack, supra, at 388, 389.

The Gulfstream Cargo case, supra, was handed down five days after the policy here in suit was issued. While it moots the "American rule" as to implied warranties in a footnote, 409 F2d at 983, referring to the Fifth Circuit's decision in Spot Pack, Gulfstream turned on the fact that fraud was sought to be perpetrated by the assured, who concealed "spectacular unseaworthiness" existing prior to the inception of the risk which vitiated the coverage under both state and federal law. Gulfstream Cargo, supra, at 983. But fraud is not involved in the instant case. The question here is whether

standards of seaworthiness may be implied in an insurance contract between a vessel owner and an insurer (not between a vessel owner and innocent third parties such as a seaman), or whether the Louisiana statute, R.S. 22:628, which would not have recognized any warranty unstated in the policy, should be given affect.

The question was and is squarely presented at all levels, and Petitioner stands on its position in both Courts below, that in a time hull policy the correct rule is as stated in The Symposium on The Hull Policy, 41 Tulane Law Review, p. 253 (1967): "The true American rule applicable to time hull policies seems to be that there is no implied warranty of seaworthiness."

The "American Rule" now adopted by the Fifth Circuit, sub silentio and per curiam, if it is to be indeed an "American Rule," should be established by this Court, since its effect involves policyholders in every littoral state. This Court has not established such a rule; nor, if one is now to be fashioned, should the secret defense of breach of implied warranty be allowed to function to the detriment of state police power.

b - The Denial of State Police Power

Both Courts below acted in derogation of public policy expressed by the Louisiana Insurance Code and the State's highest Court. It is settled in the Fifth Circuit that the Louisiana Insurance Code applies to all marine policies issued in that state. The Claribel (Coleman vs Jahncke Service, Inc.), 341 F2d 956 (CA 5-1965), reh. den., 348 F2d 868, cert. den. and dism., 382 US 967, 974 (1966); Wisconsin Barge Line, Inc. vs. Coastal Marine

Transport, Inc., 414 F2d 872 (CA 5-1969).

"The plain intendment of the law [of Louisiana] is that the respective obligations of both parties to the contract of insurance be determined by the policy itself," as it is the fixed public policy of this state that every policy of insurance 'shall contain the entire contract between the parties." Laurent vs Unity Industrial Life Ins. Co., 189 La. 426, 179 So. 586, 588 (1938), quoting Cobb vs. Unity Industrial Life Ins. Co., 19 La. App. 539, 140 So. 877, 878-9 (Orl.-1932).

It should be added that the injection, into a contract between insurer and assured, of the dictum in Union Insurance Co. of Philadelphia vs. Smith, 124 US 405 (1888), that there is an implied warranty at the beginning of the risk, is plainly not authority for denying coverage of a stranding and sinking occurring months after the policy was issued, concededly from causes which did not exist at the time the policy issued. However, the implication of such a warranty effectually rewrites the policy for the insurer's benefit to create a defensive agreement never agreed to by the parties, in derogation of all accepted canons of construction of contracts, including insurance policies.

The Eastern District of Louisiana has previously considered that it has no authority to rewrite a policy, or any other written agreement between the parties, as the alteration or making of a new contract for the parties is not within the province of the courts. Miller vs. Kellerman, 228 F.Supp. 446, 463 (WD La. - 1964), aff'd and reh. den., 354 F2d 46 (CA 5-1964), cert. den., 384 US 951 (1966). Louisiana law is the same. Texaco, Inc. vs Vermilion Parish School Board, 244 La.

408, 152 So.2d 541 (1963). And, in the Fifth Circuit, the Court's duty has been considered in the past to be "restricted to the interpretation of the contract as the parties made it for themselves." Lion Oil Co. vs Gulf Oil Corporation, 181 F2d 731, 733 (CA 5-1950).

The Fifth Circuit has therefore declined to insert coverages "not in the minds of the parties when [the] contract of insurance was entered into," and it will not "banish the parties, permit our imagination to hold sway, and write into the policy terms never contemplated by them", which "would be the creation of a new contract." C.E. Carnes & Co. vs. Employers' Liability Assur. Corp., 101 F2d 739, 741 (CA 5-1939).

But even if it were permissible, absent other circumstances, to write an implied warranty into a marine policy in some states in the Fifth Circuit, Louisiana has acted to protect assureds by prohibiting unstated conditions of coverage.

It can hardly be said that the state has no control over matters maritime. It can inspect tugs, Kelly vs Washington, 302 US 1 (1937), and has power over warranties in policies on tugs, under Wilburn Boat Co. vs Fireman's Fund Insurance Company, 348 US 310 (1954).

This Court has recently supported the right of the state of Florida to legislate in the maritime field. Askew vs American Waterways Operators, Inc., 93 S.Ct. 1590, 41 L.W. 4507 (April 18, 1973).

This Court's extensive discussion, in Askew, of the scope of permissible state action, makes it unnecessary to repeat the extensive authority cited there. This Court affirmed, 93 S.Ct. at 1593-94, 41 L.W. at 4508, the

right of the States to enact legislation promoting the welfare of the "coastal people." Louisiana's attempt to act in similar fashion to protect its citizens from secret warranties in marine policies has been rendered ineffectual if the instant decision is allowed to stand.

Mr. Justice Douglas' comment applies here:

> "To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the States over . . . the lives of the coastal people." Askew, supra at 1594, 41 L.W. 4508.

c - The Destruction of Inchmaree Clause Coverage

The decisions below have deeply disturbed the marine industry, members of which filed briefs amicus curiae in the Fifth Circuit.

For over half a century, vessel owners have insured against negligence of the master, engineers, and mariners under Inchmaree clauses such as the clause in the policy in suit, which provides in pertinent part:

> "This insurance also specially to cover (subject to the deductible average and other conditions of this policy) loss of or damage to the subject matter insured directly caused by the following:
>
> * * *
>
> "Negligence of Charterers and/or Repairers, provided such Charterers and/or Repairers are not assured(s) hereunder;
> Negligence of Master, Mariners, Engineers or Pilots;

> Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them."

The Courts below have in the instant case effectively removed this protection. In nearly every hull claim underwriters may now, exercising as they did here their right to take statements from the master and crew, probe until they find some crew shortcoming, such as inability to run an accurate compass course in fog; then assert that such shortcoming rendered the mariner incompetent and put the vessel owner in breach of the "implied warranty of seaworthiness," thereby vitiating the coverage of crew negligence.

The Fifth Circuit, in adopting the dictum of Union Insurance Co. of Philadelphia vs Smith, reversed its prior conception of the Inchmaree clause as an expansion of coverage, and, to the consternation of the industry, rendered that clause well-nigh useless, although, incongrously, that Court had said in Sea Pak, 247 F2d at 122:

> "We cannot emphasize too strongly that, as was the purpose of the underwriters in making the change, the Inchmaree clause is an expansion of coverage of considerable magnitude. Unlike so many cases, Union Insurance Co. of Philadelphia v. Smith, 124 U.S. 405, 8 S.Ct. 534, 31 L.Ed. 947; Continental Insurance Co. of City of New York v. Patton-Tully Transportation Co., 5 Cir., 212 F2d 543, 1954 AMC 889; Ideal Cement Co. v. Home Insurance Co., 5 Cir., 210 F2d 937, 1954 AMC 663; Hanover Fire Insurance Co. v. Holcombe, 5 Cir.,223 F2d 844, 1955 AMC 1531, certiorari

denied 350 U.S. 895, 76 S.Ct. 154, 100 L.Ed. 787, where each policy contained an express warranty of continuing seaworthiness and an exclusion of losses caused by unseaworthiness, a Time Hull Policy with no warranty of continuing seaworthiness but with an Inchmaree Clause does in fact underwrite unseaworthiness of many types."

The last sentence clearly no longer states the law in states within the Fifth Circuit; for the sake of uniformity and harmony in the maritime law of all states, there should be clarification at the Supreme Court level of the important problem presented.

CONCLUSION

Certiorari should be granted to resolve:

a - Once for all, the disputed "American Rule" as to whether in a marine time hull policy, there is an implied continuing warranty that the vessel and crew shall at all times be in a seaworthy condition. The present weight of authority, except insofar as altered by the Fifth Circuit's present opinion, is to the contrary. The Symposium on The Hull Policy, 41 Tulane Law Review, P. 253 (1967); 43 Am Jur. 2d, Insurance, Section 1043, p. 968.

b - The right of a state under its police power to require all terms and conditions of a marine insurance policy, or any other insurance policy, to be stated in writing, negativing surprise and fraud. Louisiana so requires, RS 22:628; the Fifth Circuit has ignored this salutary legislation notwithstanding this Court's holding in Wilburn Boat Co. vs Fireman's Fund Insurance Co., 348 US 310 (1954), that states may legislate as to

marine policy warranties.

c - The nationwide problems arising from the invocation of implied warranties of seaworthiness by way of crew incompetence, to defeat Inchmaree clause coverage of crew negligence.

Respectfully submitted,

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July, 1973

ADDENDUM A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

LEMAR TOWING CO., INC. NO. 70-1054

VERSUS CIVIL ACTION

FIREMAN'S FUND INSURANCE COMPANY SECTION D

(Filed: July 17, 1972)

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BOYLE, District Judge:

1

The Tug TRUDY B left the Industrial Canal in the Port of New Orleans on October 14,1969, at about 11:00 p.m., bound, via the Intracoastal Waterway and waters known as the Rigolets, for a destination on the West Pearl River some 80 miles north of its mouth, all of said waterways being Louisiana waters.

At all times pertinent the TRUDY B was manned by a captain, a mate and a deckhand.

The two light shell barges she was to deliver to a Jahncke loading dock were made up for pushing until she reached the Rigolets when they were placed in tow astern because of the shallow waters of that body. When she reached the mouth of the West Pearl the barges were again positioned for pushing and so remained until reaching their destination.

The voyage was not uneventful. On the night of October 15, 1969, when in negotiating a bend in the West Pearl, not far above lock #2, the tug struck and scraped her port side against the river bottom, bank or some other unknown submerged object. Fearful that some damage may have been caused by the grounding, the captain backed the TRUDY B down to lock #2, tied off the barges, and put the tug on the bank for the night.

The next morning, at approximately 6:00 a.m., it was discovered that there was at least a foot of water above the engine room deck plates. Captain Bearb then sent the mate to telephone the Jahncke facility to request a pump since the vessel's electric pump,which had been underwater during the night, was feared inoperative. Using both the Jahncke pump and the vessel's engine pump, the captain was able to pump out the vessel to the point where he could see that water was entering through the loosened stuffing boxes and a small crack[2] which he discovered in the vessel' port chine. The stuffing boxes were tightened to a mere drip and the tug continued upriver to the Jahncke location where Captain Bearb again inspected the vessel.

Captain Bearb then contacted Marcus Smith, then secretary-treasurer and now the president of Lemar Towing Co., Inc., (hereafter Lemar) and reported the condition of the tug. Smith

instructed the captain to change the oil in the clutches, plug the leak by placing rags in the crack, and return the tug to a shipyard on the Harvey Canal in Harvey, Louisiana. These tasks were accomplished and the tug was once again underway.

During the return voyage down the West Pearl the vessel's electric pump had dried and was used only intermittently to prevent its overheating. The engine pump remained operative and the entry of water was apparently controlled.

Nearing the mouth of the West Pearl, at approximately 11:00 p.m., the TRUDY B momentarily paused at the Highway 90 bridge to take on fresh water and to check the water level in the engine room which was then below the floor plates. Leaving the West Pearl the TRUDY B next stopped at the railroad bridge which crosses the Rigolets where she tied up. When the fog patches, which were encountered about the railroad bridge, appeared to be lifting the vessel then headed for Catfish Point around which lay the Intracoastal Waterway and the route home. Between the Highway 90 bridge and the railroad bridge both pumps were continuously used to control the water level in the engine room.

The captain testified that after running for approximately twenty-five minutes in the direction of Catfish Point the TRUDY B encountered dense fog and attempted to return to the railroad bridge. However, the vessel did not find the return course and after the estimated running time had elapsed without locating the bridge the captain realized that he was lost. The vessel, having no anchor, kept running in search of a place to tie off. When the fog finally lifted, it was 4:00 a.m.

on the morning of the 17th and, as was later discovered, the vessel was off the coast of Mississippi near the Gulfport-Biloxi area.

At 6:00 a.m. the vessel came upon an oyster boat whose crew gave her directions to the Gulfport Ship Channel which led into the Intracoastal. Pursuing the given course, the TRUDY B, now with water above her floor plates in the engine room, found the channel and the buoy markers as described by the oyster boatmen. As she passed Ship Island about 7:00 a.m., she encountered heavy seas and, already having taken a slight list to port, on one heavy roll to port she was unable to recover, continued to roll over, and then sank in the vicinity of the intersection of the Intracoastal and the Gulfport Ship Channel near buoy #25. The crew was taken from the sinking vessel by a passing yacht.

Notice of the sinking and tender of abandonment of the vessel to defendant underwriter was immediately given by plaintiff. Defendant rejected tender of abandonment and, while reserving all rights and defenses under the policy, denied coverage for the reason that the vessel appeared to have been beyond the navigational confines of the policy (Joint Exhibit #1). Plaintiff hired a diver to attend to the wreck and to determine the feasibility of raising it. Plaintiff was also required to rent a buoy for marking the wreck because of the Coast Guard's insistence that it constituted a hazard to navigation. The Tug TRUDY B was subsequently raised in March, 1970, at a cost of $18,000.00. Having concluded that the vessel was a total constructive loss,[3] plaintiff sold the wreck for the sum of $1.00 to Gulf Marine Surveyors who bore the expense of raising.

It is undisputed that defendant issued its

Ocean Marine term policy V-57424 on the steel tug TRUDY B owned by plaintiff; that plaintiff paid a premium of $3,262.50; that the TRUDY B sank within the time period specified in the policy; and that the defendant was timely notified of the casualty but has not made any payments under the policy nor returned the premium, or any part thereof, to the plaintiff.

Plaintiff has brought this suit to recover from defendant the full insured value under the policy, "sue and labor" expenses and penalties for the defendant's alleged arbitrary and capricious failure and refusal to pay to plaintiff the amount claimed under said policy.

Defendant takes the position that the policy issued does not cover the loss occasioned by the vessel's sinking on the grounds that several terms and conditions of said policy were breached by plaintiff prior to and at the time of the sinking, namely: (1) That the vessel was not within the navigation limits of the policy thereby suspending coverage; (2) alternatively, if the vessel had re-entered the navigation limits and sank therein, the policy did not reattach since the vessel was not seaworthy at the time of re-entry; (3) a breach of the management warranty; (4) that the sinking did not result from a peril of the sea, but from the unseaworthiness of the vessel known by the owners; and (5) failing to notify the defendant of the grounding and the resulting damage thereby depriving defendant of its right to survey the vessel after every accident. Plaintiff contends that these defenses are without merit and, in the alternative, that defendant should be estopped from asserting any defense other than breach of the policy's navigation limits, numbered

(1) above.

I. ESTOPPEL

The plea of estoppel urged by plaintiff is based on the ground that defendant initially denied coverage under the policy for breach of the navigation limits and merely added other defenses at its convenience. In support of this plea plaintiff relies on the following rule of law; "When a party to a contract refuses to perform and bases its refusal on one ground it will be held to have waived all other grounds and to be estopped when suit is brought from setting up other grounds for its refusal."[4] We need not determine the propriety of applying such rule to the case at bar since plaintiff is in error as to its major premise. On October 20, 1969, only three days after the sinking of the TRUDY B, defendant sent plaintiff a telegram[5] in which it not only denied liability for the reason that the sinking occurred outside of the policy navigation limits but also specifically reserved all of its rights and defenses under the policy.[6]

Plaintiff also contends that defendant should not be allowed to defend on any basis because of its failure to tender a return of the premium. As authority for this proposition plaintiff cites Cass Bank & Trust Co. v.National Indemnity Co., 326 F.2d 308 (8th Cir. 1964) and Phoenix Assurance Co. of New York v. City of Buckner, 305 F.2d 54 (8th Cir. 1962). Both cases, which involve the application of Missouri law, are inapposite for they hold that a tender or return of premium is a prerequisite for defending on the ground that a policy is void ab initio. We do not construe the defenses raised by the underwriter as contending that the policy sued on was void ab initio. On the contrary, said defenses are based on the policy, its terms and conditions.

We note with considerable interest, however, the language of the policy with respect to the management warranty clause:

> "It is agreed that if, during the currency of this Policy, the Assured's interest in the vessel hereby insured shall change or there shall be any change in the management of the Vessel, this Policy shall become null and void from the date of such change unless such change shall have been assented to in writing by the Underwriters. In event of such termination a pro rata daily return of net premium shall be made."

Defendant argues that a change in management of the vessel occurred prior to the time of its sinking and that the policy terminated as of the date of said change; yet defendant has neither tendered nor made any pro rata daily return of the net premium. Defendant's retention of the entire premium, in view of the policy language, seems inconsistent with its contention that the policy had been terminated prior to the sinking of the vessel. Understandably such conduct on the part of defendant, if allowed, would work to the detriment of the plaintiff in that plaintiff would have neither a proportionate return of the premium nor the protection of the policy which said premium was to secure. Both Federal and Louisiana decisions require that a defendant be held estopped from asserting a breach of warranty in its defense where its actions are inconsistent with a denial of liability. Reliance Ins. Co. v. The Escapade, 280 F.2d 482 (5th Cir. 1960); Kahmann & McMurry v. Aetna Ins. Co. of Hartford, Conn.,242 F. 20 (5th Cir. 1917); Sholes v. Continental Casualty Company, 196 So. 2d 680 (La. App. 4th Cir. 1967).

A holding on this issue would be in accord with the decisions which recognize that an insurer may be estopped by its conduct from insisting upon a forfeiture provision of the policy, but that coverage or restrictions on coverage may not be extended by the application of the doctrine or waiver or estoppel. Reisman v. New Hampshire Fire Insurance Company, 312 F. 2d 17 (5th Cir. 1963); Reliance Insurance Company v. The Escapade, supra. See also C. E. Carner & Co. v. Employers' Liability Assur. Corp., 101 F. 2d 739 (5th Cir. 1939) (applying Louisiana law). However, a holding on the issue of estoppel with respect to the management warranty clause is not required, for we are convinced that the warranty was not breached.

II. THE MANAGEMENT WARRANTY CLAUSE

Defendant points to several factors which indicate that prior to her sinking the TRUDY B was managed and operated by M. & L. Boat Rental, Inc. (hereafter M. & L.), an entity separate and apart from the assured, Lemar. The evidence further revealed that M. & L., in business as a boat rental brokerage company, was solely owned by Leroy Buras and Marcus Smith who also served as its officers. Primarily M. & L. handled the chartering of Lemar's vessel, arranged for her repairs and furnished her crew. It was established that Buras and Smith together owned 50% of the stock of Lemar and at the time of the voyage and sinking in question they were its managing officers; Buras served as president and Smith was secretary-treasurer.

We find that Leroy Buras and Marcus Smith, whether acting on behalf of Lemar or M. & L., retained direction and control of the vessel. We, therefore, conclude that here there was no change in the management of the vessel as opposed to the change found in Whiteman v. Rhode

Island Insurance Co., 78 F.Supp. 624 (E.D. La. 1948), the decision relied on by defendant herein.

III. NOTICE OF CASUALTY

Underwriter next contends that the policy was voided by the assured's failure to give prompt notice of the grounding and the damage resulting therefrom, and that underwriter was thereby denied its right to survey the vessel after every accident.

Apparently the underwriter is contending that when the assured received notice, on October 16, of the grounding which occurred on the prior night, that information should have been immediately conveyed to the underwriter by the assured. The policy requires prompt notice of any casualty so that underwriter will have reasonable opportunity to be represented at a survey of the damage. However, underwriter offered nothing to show that such a survey would have been required or whether one would have been conducted on the West Pearl.

The assured first learned that the TRUDY B was having trouble on the morning of the 16th when it received a call from the Jahncke people and was advised that a pump had been taken to the tug. Captain Bearb later called and informed the assured that the tug had been holed and was taking water but that the pumps could control the flow. Bearb was instructed to secure the leak in the best possible manner and to proceed immediately to a yard on the Harvey Canal where the necessary repairs could be effected. Leroy Buras, president of the assured corporation, admitted that he did not consider having temporary repairs made on the West Pearl nor did he consider contacting the underwriter to have a survey made.

Both the captain and the assured believed that it would be entirely safe for the TRUDY B to make the return voyage to the Harvey Canal. Under the circumstances then known, it can be said that the assured acted in an ordinarily prudent manner in directing the immediate return of the vessel. While the assured has a duty under the policy to promptly report any casualty, it has been held that every seemingly trivial accident which occurs need not be reported. Utah Home Fire Ins. Co. v. Mechanical Equipment Co., 242 F. 2d 513 (5th Cir. 1957). In Utah Home Fire Ins. Co., supra, the TUNA FISH grounded and, while being towed to its home yard in Houma, flooded and sank. There the assured was not held to have breached a similar notice clause in failing to notify the underwriter of the grounding. There it was also significant that the libellant felt that he had no claim under the policy since the anticipated damage did not exceed the deductible.

Nothing in this record indicates that the assured considered whether he had a claim under the policy; however, our attention is directed to the policy provision which contains a $2,000.00 deductible resulting from any one casualty. It is likely that the extent of the damage, then known to the assured, was within the $2,000.00 deductible. On the authority of Utah Home Fire Ins. Co. v. Mechanical Equipment Co., supra, we hold that the warranty of prompt notice was not breached. What has just been said relates only to the grounding of the vessel on October 15, for it has been stipulated that underwriter was timely notified of the vessel's sinking.

IV. NAVIGATION LIMITS

It is also stipulated that "the vessel

sank . . . within the territorial waters of the State of Mississippi, but less than 50 miles from the shore of Louisiana." The navigation limits of the policy are contained in the clause which reads:

> Warranted by the Assured limited to the use and navigation of the inland and coastal waters of Louisiana including the Mississippi River not north of Baton Rouge and not exceeding fifty (50) miles offshore.

Underwriter interprets this clause as limiting coverage to an area within the Louisiana State boundary lines extended 50 miles offshore. Thus, underwriter would place the casualty sued on herein outside of such an area since the sinking occurred on the Mississippi side of the extended Louisiana-Mississippi State line. Plaintiff, on the other hand, insists that the clause clearly covers a loss occurring in any water, Louisiana or Mississippi, within 50 miles of the shore or coast of Louisiana.

The issue in dispute, as we see it, hinges on the interpretation of the phrase "coastal waters of Louisiana." In the recent case of Simon v. Switzerland General Insurance Co., 238 So.2d 257 (La. App. 3rd Cir.) writ refused, 256 La. 897, 240 So.2d 232 (1970), a Louisiana Appellate Court was faced with the interpretation of a policy restriction: "Navigation Limits: Inland and Coastal Waters of Texas, Louisiana, and Mississippi." But there the issue was whether the phrase "coastal waters" of Louisiana extended only three miles from land or extended to distances of 30 to 50 miles from the Louisiana coastline. In arriving at the conclusion that an accident which occurred approximately 35 miles south of the Louisiana shoreline was within the coverage of

the policy, that Court reasoned:

> ". . . Common sense would seem to dictate that a three mile limitation from land would be as unreasonable, if not an absurd, limit where one is allowed to travel from Louisiana to Mississippi or Texas or even from Texas to Mississippi along the coast.

We feel, in the case at bar, that it would be equally unreasonable if one were allowed to travel 50 miles off shore from a given point on the Louisiana coast and be within coverage, but be denied coverage for venturing into Mississippi waters considerably less than 50 miles from that same point on the Louisiana coast. Common sense would, therefore, dictate that the interpretation of the navigation limits proposed by the underwriter is unacceptable.

A realistic look at the Louisiana coastline, particularly in the area of the Mississippi Sound and the Chandeleur Sound,[7] supports this conclusion. The Chandeleur Islands, within the territorial limits of Louisiana, are approximately 10 miles south, or seaward, of the area in which the TRUDY B went down. Her farthest penetration into Mississippi waters in the Mississippi Sound area was less than 50 miles if measured from the easternmost mainland coast of Louisiana or from the Chandeleur Islands to either point, east or west of the Gulfport channel where (on Exhibit Bearb #1) Bearb marked the locations, at which he said, at various times, he met the oyster boat on the morning of October 17, 1969. The waters of the Mississippi Sound lie within the Louisiana boundary east of Lake Borgne and south of the coast of the State of Mississippi, thus forming the coastal waters of both

Louisiana and Mississippi in that area.

We have given what we consider a reasonable construction to the language of the policy, one which is contrary to the contentions of the underwriter. Such a result would have been reached in any event for when the terms of a policy are not clear and are subject to different construction, as is the language here, said terms are construed against the underwriter who has included them in its policy. Simon v. Switzerland General Insurance Co., supra.

We conclude that the vessel had not ventured outside the navigation limits provided in the policy. Having so concluded, we need not consider defendant's contention that the vessel returned in an unseaworthy condition. The grounding of the tug, which allegedly caused the loss, occurred in the inland waters of Louisiana. Its sinking and its travel prior thereto occurred within the navigation limits of the policy.

V. THE ALLEGED UNSEAWORTHINESS

Underwriter, in its final attempt to avoid liability, contends that the TRUDY B was unseaworthy and that her owners knowingly sent her to sea in said unseaworthy condition. Underwriter further adds that the loss of the vessel was caused by the same unseaworthy condition which, it is contended, is not an insured peril and for which there is no coverage. Such contentions resemble the "double-bottomed defense of avoidance of the whole policy and a negation of damage from an insured peril" raised in cases where the policies in question "contained an express warranty of continuing seaworthiness which was patently breached." Saskatchewan Government Insurance Office v. Spot

Pack, 242 F.2d 385, at 388 (5th Cir. 1957).

Before reaching the merits of this defense, we must first determine whether the issues raised herein are to be governed by the law of Louisiana or by that of the sea. In Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), the United States Supreme Court held that the regulation of marine insurance should be left to the states. Justice Harlan, in a later case, remarked that "[t]he application of state law in [Wilburn] was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented." Kossick v. United Fruit Co., 365 U.S. 731, 742, 81 S.Ct. 886, 894, 6 L.Ed. 2d 56 (1961), cf. Irwin v. Egal Star Ins. Co., Ltd, 455 F.2d 827 (5th Cir. 1972). The rule to be followed in the Fifth Circuit is that State law should be applied in the field of marine insurance where there is no controlling federal authority with respect to the specific issue before the court. Fireman's Fund Insurance Co. v. Wilburn Boat Co., 300 F.2d 631 (5th Cir. 1962) (on remand), cert. den. 370 U.S. 925, 82 S.Ct. 1562, 8 L.Ed. 2d 505. Since the standard of seaworthiness is solidly entrenched in federal maritime jurisprudence, Aguirre v. Citizens Casualty Company of New York, 441 F.2d 141, 146 (5th Cir. 1971), cert. den. 404 U.S. 829, we must apply the federal maritime law.

Though the insurance contract on the TRUDY B contains no express warranty of seaworthiness, the Fifth Circuit recognizes that there exists in a time policy, such as the one sued on herein, an implied warranty of seaworthiness. Saskatchewan Government Insurance Office v. Spot Pack, supra; Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co.

247 F.2d 116 (5th Cir. 1957), cert. denied, 355 U.S. 903, 78 S.Ct. 331, 2 L.Ed. 2d 260; Gulfstream Cargo, Ltd. v. Reliance Insurance Co.,409 F.2d 974 (5th Cir. 1969). It is impliedly warranted that the vessel is seaworthy as of the very moment of the attachment of the insurance; and if the vessel is in fact unseaworthy at the time the insurance were to attach, the breach avoids the policy. Gulfstream Cargo, Ltd. v. Reliance Insurance Co., supra.

Yet the implied warranty does not end there; it is a continuing obligation that the vessel "[o]wner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition." Saskatchewan Government Insurance Office v. Spot Pack, supra at 388. However, a breach of the implied negative warranty after the policy has attached does not avoid the policy altogether and only exonerates the underwriter for loss or damage proximately caused by the unseaworthy condition. Saskatchewan Government Insurance Office v. Spot Pack, supra.

There is no allegation that the TRUDY B was unseaworthy as of March 23, 1969, the inception of the policy. The insurance, therefore, became effective as of that date. We noted earlier that defendant was not claiming that the policy was void ab initio. On or about July 12, 1969, the TRUDY B was placed in drydock at Wall Shipyard where her underwater condition and her running and steering gear was thoroughly inspected and overhauled at a cost of $1,018.98.[8] In October, 1969, just prior to her fatal voyage, the TRUDY B was again drydocked at the Wall Shipyard for minor repairs to her bottom.[9] This evidence supports our finding that the shipowner exercised due diligence in

maintaining its vessel in a seaworthy condition.

The defendant does contend that the crew which manned the vessel on her voyage to the West Pearl was incompetent, thereby rendering the vessel unseaworthy. To escape liability by way of this contention the underwriter must prove that the shipowner had knowledge of this unseaworthy condition, if in fact it did exist, and that said condition was the proximate cause of the loss. Gulf Coast Trawlers, Inc. v. Resolute Insurance Company, 239 F. Supp. 424 (S.D. Tex. 1965).

Mindful of the rule that the underwriter bears the burden of proving unseaworthiness, we must determine whether the TRUDY B was unseaworthy because of her crew solely on the weight of the evidence and without regard to whatever maritime skills the Court may possess. Saskatchewan Government Insurance Office v. Spot Pack, supra; Hanover Fire Insurance Company v. Holcombe, 223 F. 2d 844 (5th Cir. 1955), cert. denied 350 U.S.895, 76 S.Ct. 154, 100 L.Ed. 787. While seaworthiness is a comprehensive term requiring that the vessel be staunch and strong, fitted out with proper equipment and a sufficient and competent crew, it is also a relative term, relative to the type of voyage or service proposed. Gilmore and Black, The Law of Admiralty 58 (1957).

The concept of seaworthiness extends not only to the vessel and its gear but also to its crew. Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724, 87 S.Ct. 1410, 18 L.Ed. 2d 482 (1967); Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed. 2d 413 (1959); Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336,

75 S. Ct. 382, 99 L.Ed. 354 (1955). It is clearly the duty of a shipowner to not only provide a crew sufficient in number, June T. Inc. v. King, 290 F. 2d 404 (5th Cir. 1961), but also a crew competent for the duties it may be called upon to perform, including provision for any exigency which is likely to be encountered. Petition of United States, 303 F.Supp. 1282 (E.C. N.C. 1969) aff'd 432 F.2d 1357 (4th Cir. 1970); Empire Seafoods. Inc. v. Anderson, 398 F.2d 204 (5th Cir. 1968); Admiral Towing v. Woolen, 290 F.2d 641 (9th Cir. 1961).

"Seaworthiness, as that term has been defined and redefined, is reasonable fitness to perform or do the work at hand." Walker v. Harris, 335 F.2d 185 (5th Cir. 1964), cert. denied, 379 U.S. 930, 85 S.Ct. 326, 13 L.Ed. 2d 342 (1964). Walker teaches that the answers to the following questions will lead to the ultimate conclusion as to the seaworthiness or unseaworthiness of the vessel: "What is the vessel [here the crew] to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny [here the crew], sufficient to withstand those anticipated forces? If the answer is in the affirmative, the vessel (or its fitting) is seaworthy." 335 F.2d at 191.

The TRUDY B was hired to take two empty barges from a location on the Industrial Canal to a loading facility on the West Pearl River and to return with the loaded barges, a voyage requiring navigation through inland waters only. To accomplish this task the TRUDY B was manned by Captain Ronald Bearb, a mate and a deckhand. The tug had no radar but was equipped with a liquid compass. The Jahncke people on the

Industrial Canal provided Captain Beard with a map of the Intracoastal heading east and showing the way to the railroad bridge and from there to the mouth of the West Pearl. Beard testified that there were no charts of the West Pearl aboard the tug and that he found the river difficult to navigate because of its many bends. Though the record is not clear, there is some evidence that someone was to meet the TRUDY B on the West Pearl to assist in the navigation of that river; but upon the tug's arrival at the Highway 90 bridge Bearb found no one and took the vessel upriver himself. We are unable to determine whether that person was to be someone connected with Jahncke or Lemar.

Captain Bearb was 21 years old at the time the voyage commenced. He left school at 14, after completing the sixth grade, and farmed until he was 16, when he began working on boats. Apparently, he worked for one employer for about three years as a deckhand and one month as a mate on a tug. When he was laid off, he returned to farming for about eight months, following which, in 1969, he was employed for approximately seven months as skipper of a crew boat transporting personnel from Dulac, Louisiana, offshore in the Gulf of Mexico. He claimed that as skipper of the crew boat he would run 100 to 150 miles on compass. His crew boat had charts aboard which he claimed he could read and from which he said he could fix a compass course.

It should be noted that in his testimony concerning events following the TRUDY B's departure from the railroad bridge on its return voyage to New Orleans on the night of October 16, 1969, Bearb testified that a 90° turn would have turned the vessel in the

direction from which it was then proceeding and that a 160° turn would be a full circle.

After his employment aboard the crew boat terminated he was hired by Leroy Buras, with the knowledge of Marcus Smith, following the hurricane "Camille" which struck Louisiana and Mississippi in late August, 1969. He worked as mate aboard the tug CAPTAIN SCOTT, an M. & L. vessel, for about one month and then went to M. & L.'s KENDALL S, during which a part of the time he acted as captain. Since he went aboard the TRUDY B on October 14, 1969, the total time he served on the KENDALL S was CAPTAIN SCOTT was only for a period of about one month (sic). Landry further testified that the operations of the CAPTAIN SCOTT were primarily confined to inside waters. Landry considered Bearb well qualified to serve as a tugboat captain and recommended him for that position when, due to the illness of another captain, Bearb was offered and did accept the position of captain aboard the tug KENDALL S.

Neither the mate nor the deckhand were called to testify. Defendant's attempt to have their out of court statements admitted into evidence was aborted when plaintiff's objection thereto was sustained. Bearb testified that the deckhand's first service was aboard the TRUDY B on this occasion. He also testified that he had been acquainted with the mate before the latter entered the armed forces and had previously worked with him on the vessels of another boat operator. The evidence further indicates that the mate had one year's prior service as a deckhand and one month's prior service as a mate. Bearb testified that he employed the mate for service aboard the TRUDY B, but didn't know if the mate had ever been in the Intracoastal

Canal east of the Mississippi River previously or whether he could read charts.

As president of Lemar, Leroy Buras was in charge of hiring the captains and crews for the TRUDY B. Apparently, as a normal procedure he required that captains have four years on tugs and that mates have 18 to 24 months on deck with knowledge of handling tugs.

But Buras testified that he delegated to Beard, who began working for his various companies in August, 1969, when he later became captain of the TRUDY B, the hiring of the mate and deckhand. Although he acknowledged it was his obligation to see they were qualified, he was not aware that the mate had only served as a deckhand one year and as mate only one month previously, nor did he check into their prior experience.

As to Beard, Buras stated he knew Beard had worked on boats and had the experience necessary to be captain; but he also testified that he didn't know what Bearb's qualifications were, had never worked with Bearb aboard vessels, gave him no examination, knew he had no license, his company had no personnel records and didn't know how long Bearb had been on the TRUDY B at the time of the sinking. Furthermore, he acknowledged that he knew Beard was not familiar with the waters in the Pearl River area.

The tug experienced no difficulty on her voyage from New Orleans through the Intracoastal Canal and with the aid of the map provided by the Jahncke people easily found the mouth of the West Pearl after passing the railroad bridge which crosses the Rigolets.

On deposition Beard estimated that it took the tug 2 hours to run the Intracoastal and another 2 hours to reach the mouth of the West Pearl. On trial, however, Beard stated that it took about 5 hours to navigate from the Intracoastal to the mouth of the West Pearl, a distance which he estimated to be about 7 miles but which is actually less than 3 miles. Beard explained that because of the shallow water between the Intracoastal and the mouth of the West Pearl he had to put his two empty barges astern and proceed at a slow speed. However, the chart shows that there is little, if any, shallow water in that area.

Other than the grounding, during the voyage up the West Pearl on a number of occasions the tug got stuck. In all it took more than 30 hours from the time the tug entered the winding West Pearl for her to reach the Jahncke facility some 80 miles from the river's mouth.

The TRUDY B, in her damaged condition and without her barges, departed the Jahncke dock near 3:00 p.m. on the afternoon of the 16th. After running for only 8 hours she reached the mouth of the West Pearl. It was then 11:00 p.m. and somewhat hazy. On clearing the railroad bridge at about 11:30, Beard testified that the weather appeared good and that it was not necessary to lay a compass course to Catfish Point for he could see the point and the shore line on each side. Beard claims to have hit a solid fog bank at about 12:00 midnight.

From the railroad bridge to the channel of Intracoastal Waterway below Catfish Point the distance is shown to be slightly over one mile. Catfish Point is less than a mile from the railroad bridge and, as Beard

testified, was visible from the railroad bridge. There are two flashing lights in the area of Catfish Point, one at the Intracoastal Waterway and the other slightly to the southeast of the first light. Apparently, Bearb had used one of those lights in navigating from the Intracoastal toward the mouth of the West Pearl en route to the Jahncke facility.

The light at the Intracoastal Canal channel is approximately one mile from the railroad bridge and should have been seen by Bearb upon his departure from the bridge if, as he testified, the weather was sufficiently clear for him to see the land at Catfish Point at that time. He also testified that the fog set in at about midnight, 30 minutes after the time of his claimed departure from the railroad bridge. Bearb testified that the tug was making about nine miles per hour after leaving the railroad bridge and before running into the fog, the point of which he indicated on the chart, (Exhibit "Bearb #3"), by an arrow placed approximately opposite Catfish Point, a distance of less than one mile from the railroad bridge. If the tug's speed was nine miles per hour during the 30 minutes after departure from the railroad bridge when Bearb claimed the fog set in, he would have been nearly five miles from the railroad bridge and approximately four miles south or southeast of Catfish Point when the fog set in.

The tug, running at a speed of nine miles per hour, should have reached the channel of the Intracoastal with the lights in full view after only 10 minutes, or at 11:40 p.m., if the fog did not set in until midnight.

Bearb testified that after running in the fog for a few minutes he became nervous and then executed a 90° turn which he expected would bring him back to the railroad bridge. We infer, considering that the vessel was later determined to be in the waters of the Mississippi Sound off the Gulfport-Biloxi area, that the 90° turn was to port and that if it was executed in the proximity of the point indicated by Bearb on the chart where the fog was to have set in, Beard would have run the tug aground shortly thereafter at some point opposite and to the east-northeast of Catfish Point.

Beard testified that during the night he ran his engines at idle speed or about two miles per hour. At such rate of speed there would have been no way he could have traveled over 30 miles between midnight and 4:00 a.m. What is even more incredible is that Bearb could have reached a point off the Gulfport-Biloxi area without having grounded at some point previously considering the shallow waters en route to that area from Catfish Point, the fog claimed to be present and Beard's complete lack of knowledge of the waters he traversed.

Nevertheless, the TRUDY B proceeded in excess of 30 miles in an easterly direction to the point where she encountered the oyster boat off the Mississippi Coast.[10]

Bearb's testimony concerning the location where he encountered the oyster boat, which he previously said was a shrimp boat, and his testimony with respect to the course he followed to where the vessel sank near bouy #25 in the Gulfport Channel is hopelessly confused. On deposition Bearb stated that he encountered the oyster boat west of the

Gulfport Channel. From there, a 210° course which Bearb said he was given by the oyster boat crew would not have taken him to the Gulfport Channel but would have headed him in the direction of the Intracoastal. On trial Bearb testified that he located the oyster boat east of the Gulfport Channel and had he steered the 210° course from there it would have brought him into the Gulfport Channel at some point north of its intersection with the Intracoastal. At all events, when the TRUDY B sank she was in the Gulfport Channel about six miles south of the point where the Intracoastal intersects with the Gulfport Channel.

About seven hours after the TRUDY B encountered the fog as Bearb claimed, she sank as previously mentioned above. Had she found Catfish Point and the Intracoastal Waterway between 11:30 p.m. and midnight on the night of October 16th, she probably would have reached New Orleans and a safe harbour long before 7:00 a.m. on the 17th. Beard testified that on the voyage from New Orleans the tug, with barges in tow, was averaging about seven miles per hour and that the distance from the Industrial Canal where the voyage began to the point where the tug left the Intracoastal Waterway to proceed past the railroad bridge to the mouth of the West Pearl was approximately 20 miles. Using the tug's estimated speed of seven miles per hour with barges in tow, the return trip to New Orleans from that point would have required approximately three hours. Using an estimated speed of nine miles per hour, which Bearb claims he was maintaining after leaving the railroad bridge on the return voyage, the tug, without her tow, could have reached New Orleans from that point sometime between two and three hours.

However, the TRUDY B did not reach New Orleans. During the seven hours from the time of departure from the railroad bridge she took on a quantity of water which contributed to her sinking.

Fred Perrin, a marine surveyor who examined the vessel on March 11, 1970, after she had been raised, testified that the grounding of the TRUDY B not only caused her to be holed but also caused damage to the vessel's propeller shaft struts. It was Perrin's opinion that the damage to the struts caused the propeller shaft to whip which in turn caused the packing glands in the stuffing boxes to become disarranged so as to eventually allow the influx of an amount of water sufficient to cause the sinking. It was also his opinion that the crack opened by the grounding would not have permitted the entry of such a quantity of water which could have overcome the vessel's pumps and caused her to sink. Perrin's testimony was substantiated by the survey report made at the time of his examination.[11]

We conclude that the crew of the TRUDY B, and particularly its captain, was incompetent at the commencement of the voyage, thus rendering the vessel unseaworthy at that and subsequent times and that such unseaworthiness proximately resulted from the owner's neglect in failing to determine the qualification and competence of the crew to man the vessel for the intended voyage before its commencement. We further conclude that such unseaworthiness was the proximate cause of the loss of the TRUDY B. And since the unseaworthiness was caused by the incompetence of the crew, and not by the negligence of the master or crew, the Inchmaree clause is thus inapplicable.

Having so breached the implied warranty of seaworthiness, plaintiff is not entitled to recover. Accordingly, judgment shall be entered for the defendant dismissing plaintiff's suit at its cost.

This opinion shall serve as our findings of fact and conclusions of law.

New Orleans, Louisiana, July 17,1972.

(Signed) Edw. J. Boyle, Sr.
United States District Judge

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FOOTNOTES

1 The tug TRUDY B (ex-MANDY LEE), official number 270811, was built in 1955; she was of 38 gross and 26 net tons, 48'3" long, 16'6" in beam, and 6'6" in draft; she had twin screws powered by two V8-71 GM diesel engines, developing a total of approximately 600 horsepower.

2 Captain Bearb described the crack as being about 8' in length and about 1/4 of an inch wide. Marine Surveyor Fred Perrin, who examined the vessel, testified that the total crack was 8" but that only 3 or 4 inches of the crack were open and then only about 1/32 of an inch wide.

3 Defendant, at page 1 of its pre-trial memorandum conceded that the TRUDY B, after sinking on October 17, 1969, was a total constructive loss.

[4] This "rule" is contained in a footnote to an annotation in 18 ALR 2d 491 §31 which treats with the insurer's inability to raise the defense of the insured's failure to give written notice of a claim where the insurer has previously denied coverage on some other ground.

[5] Joint Exhibit #1.

[6] Fireman's Fund Exhibit #2 and Plaintiff's Exhibit #9.

[7] Fireman s Fund Exhibit #1.

[8] Plaintiff's Exhibit #5.

[9] Plaintiff's Exhibit #6.

[10] The distance from Catfish Point to Gulfport is about 35 miles and to Biloxi is about 42 miles.

[11] See Plaintiff's Exhibit #10.

ADDENDUM B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LEMAR TOWING COMPANY, INC. — No. 70-1054

Versus — CIVIL ACTION

FIREMAN'S FUND INSURANCE COMPANY — SECTION D

JUDGMENT

This cause came on for trial before the Court on September 13, 1971 and September 14, 1971, and after hearing the evidence the Court took the matter under submission.

Now, therefore, for the written reasons on file herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Fireman's Fund Insurance Company, and against the plaintiff, Lemar Towing Company, Inc., dismissing said plaintiff's suit at its cost.

New Orleans, Louisiana, this [illegible] day of July, 1972

BENJAMIN W. REISCH, CLERK

APPROVED AS TO FORM:

UNITED STATES DISTRICT JUDGE

Joaquin Campoy, Esq.
William S. Stone, Esq.

Francis Emmett, Esq.
Bruce W. Dinwiddie, Esq.

JUL 19 1972

(7)

ADDENDUM C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3007
Summary Calendar*

LEMAR TOWING COMPANY,
Plaintiff-Appellant,

versus

FIREMAN'S FUND INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(January 12, 1973)

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM: The opinion of the District Court is reported, *Lemar Towing Company v. Fireman's Fund Insurance Company*, ____ F.Supp. ____. On the basis of that opinion we affirm the judgment below.

AFFIRMED.

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

ADDENDUM D

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-3007
Summary Calendar

D. C. Docket No. 70-1054 "D"

LEMAR TOWING COMPANY,

Plaintiff-Appellant,

versus

FIREMAN'S FUND INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

January 12, 1973

Issued as Mandate:
JUN 19 1973

Marguette Farley
Deputy

ADDENDUM E

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3007

LEMAR TOWING COMPANY,
Plaintiff-Appellant,

versus

FIREMAN'S FUND INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Jan. 12, 1973, 5 Cir., 1973, ____ F.2d ____).

(June 11, 1973)

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that

the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-253

LEMAR TOWING CO., INC.,
Petitioner

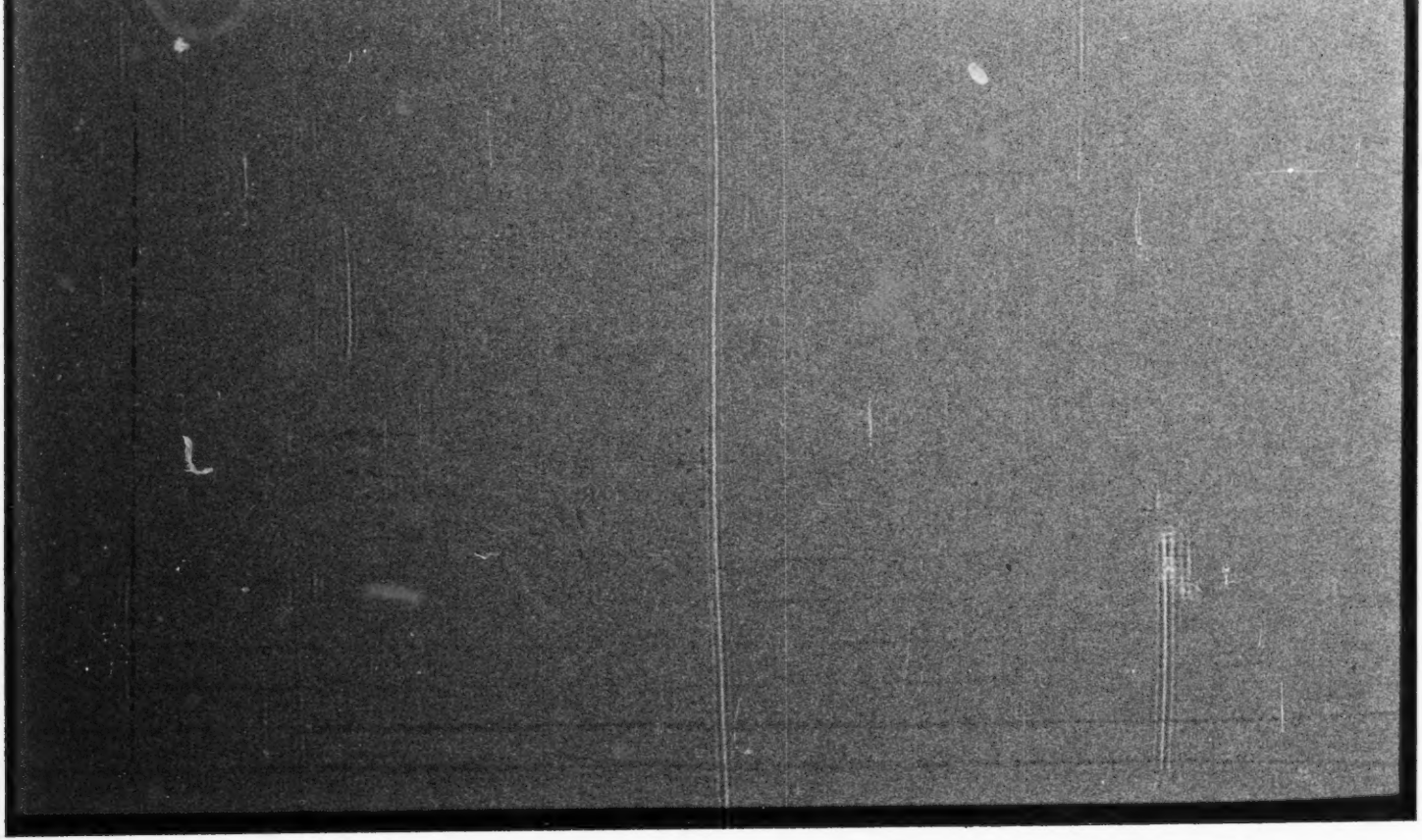
versus

FIREMEN'S FUND INSURANCE COMPANY,
Respondent

OPPOSITION TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-253

LEMAR TOWING CO., INC.,

Petitioner

versus

FIREMEN'S FUND INSURANCE COMPANY,

Respondent

OPPOSITION TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

We are regretfully forced to take sharp issue at the very outset with petitioner's statement of the question presented. As phrased by petitioner, that question has little recognizable resemblance to the facts and the law of this case.

Even a cursory reading of the trial court's opinion, rendered after hearing all the witnesses in person, affirmed by the Fifth Circuit, will quickly make obvious that this is an ordinary, textbook case of marine insurance, in which the district court found as a fact that the loss of the insured vessel was caused, not by a risk

or peril insured by respondent's policy, but by unseaworthiness, specifically incompetence of the captain and crew, to which unseaworthiness the assured petitioner was privy.

Unseaworthiness to which the assured is privy, is not and never has been a risk insured under a marine insurance policy.

The case does not involve any contravention of *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 US 310 (1954), does not at all adversely affect, as claimed, "every American time hull policy written without warranties of seaworthiness", and does not in any way whatsoever contravene any state legislation. These "issues" will readily be seen to be artificial "issues" which petitioner, in the enthusiasm of advocacy, seeks to inject into an otherwise quite simple case, a case decided by the courts below on well-established rules of marine insurance law.

The district court found:

> "We conclude that the crew of the TRUDY B, and particularly its captain, was incompetent at the commencement of the voyage thus rendering the vessel unseaworthy at that and subsequent times and that such unseaworthiness proximately resulted from the owner's neglect in failing to determine the qualification and competence of the crew to man the vessel for the intended voyage before its commencement. We further conclude that such unseaworthiness was the proximate cause of the loss of the TRUDY B".

This finding of fact, not "clearly erroneous", but obviously

correct, fully supported by the evidence was adopted by the Court of Appeals in its affirmance (addendum to petition, p.45), and it is submitted, is not open to review in this court.[1]

Nothing in this, purely a factual situation, warrants issuance of a writ.

STATEMENT OF THE CASE

The incredible voyage of this vessel has been related in great detail in the lengthy, carefully prepared opinion of the district judge, and need not be repeated here. The crux of it is that the vessel, already in a damaged condition from a grounding, proceeded down West Pearl River, near the boundary between Louisiana and Mississippi, intending to turn in a westerly direction into the protected waters of the narrow Gulf Intracoastal Canal, bound for New Orleans, to the *west*, for repairs. At the mouth of the West Pearl River, lost in a fog, and because the 21 year old inexperienced captain could not read his compass, the vessel turned to the *east* and proceeded for more than thirty miles in that easterly direction into the relatively rough and open waters of Lake Borgne and the Mississippi Sound. For some seven hours, the vessel was proceeding east, instead of west, and was in open waters instead of the protected waters of the canal. During this entire time the captain was not only ignorant that he was going east instead of west, and even had to ask a passing boat how to get home, but also, as the district court said, he had a "complete lack of knowledge of the waters he traversed".

---

[1] *McAllister v. United States*, 348 U.S. 19 (1954).

His vessel sank in the relatively rough and open waters of Mississippi Sound, instead of being in a place of safety, the protected waters of the narrow Gulf Intracoastal Canal or the harbor of New Orleans, 70 or 80 miles away, which she should have reached long since.

ARGUMENT

(a) The McAllister Rule

The law is plain beyond dispute that in order to permit a recovery, it is necessary for the insured to bring his claim for loss within the provisions of the policy and to establish that the loss was caused by one of the perils insured against. *Swan v. The Union Ins. Co.*, 16 US (3 Wheat.) 168 at 170 (1818); to the same effect: *Klein v. Globe & Rudtgers Fire Ins. Co.*, 2 F2d 137 (3rd Cir., 1925); *Rockwood v. Northwestern F & M Ins. Co.*, 26 F2d 824 (EDNY 1928,; *The Wash Gray*, 19 F2d 493 (5th Cir.), reversed on other grounds, 277 US 66 (1928); *The Holly*, 11 F2d 495 (3rd Cir., 1926); *Soelberg v. Western Assurance Co.*, 119 F2d at 31 (9th Cir., 1902).

With the district court finding, as fact, and correctly, that the crew, particularly the captain, was incompetent at the commencement of the voyage, rendering the vessel unseaworthy, that the assured owner, petitioner, was privy to that unseaworthiness, and that the unseaworthiness was the proximate cause of the loss, the loss was not within the coverage provided by the policy. The Circuit Court of Appeals, by affirming, inferentially and correctly adopted these well founded findings of fact under the *McAllister* rule, as not "clearly erroneous".

As we have said, loss by unseaworthiness to which the

assured, as here, is privy, is not and never has been a loss by peril or risk insured by a marine policy.

(b) The Inchmaree Argument

The policy contained the Inchmaree clause, so called because of the name of the vessel in the British case which gave rise to it, *Thames & Mersey Marine Ins. Co. v. Hamilton, Fraser & Co.*, 12 App. Cas. 484 (1887). The clause insures against loss or damage ". . . directly caused by the following: . . . Negligence of Master, Mariners, Engineers, or Pilots; Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them".

The district court found, as fact, that the unseaworthiness of the vessel (incompetent captain and crew), "proximately resulted from the owner's neglect in failing to determine the qualification and competence of the crew to man the vessel for the intended voyage before its commencement". This finding that the unseaworthiness which caused the loss had resulted from the "want of the due diligence" by the assured, the owner, obviously precluded recovery under the Inchmaree clause.

Petitioner's argument on this score singularly ignores the proviso of the clause that the loss "has not resulted from want of due diligence", and ignores the specific finding here that the owner was guilty of neglect with regard to qualification and competence of crew. So, too, is the whole argument which has been confected on the *Sea Pak* (Tropical Marine Prod. v. Birmingham Fire Ins. Co.), 247 F.2d 116 (5 CA 1957) cert. den. 355 U.S. 903 (1957). The argument ignores the vital finding of the

owner's want of due diligence in the instant case, while in *Sea Pak* there was no proof of such want of due diligence. Nothing whatsoever in the *Sea Pak* warrants an argument that where the owner is privy, as here, to the unseaworthiness which causes the loss, the Inchmaree clause could possibly permit recovery.

This whole argument is without merit, as are the unfounded predictions of dire results to flow from the correct holding of the courts below.

ALLEGED INVOLVEMENT OF LOUISIANA LAW

It is abundantly clear that, under the findings of fact of the district court, there can be no recovery under the policy, wholly regardless of any condition or warranty implied by federal maritime law or the effect of Louisiana Revised Statutes 22: 628 upon such a federal rule. Those are artificial "issues", sought to be injected by petitioner, and do not exist in this case. This may explain why the Court of Appeals summarily affirmed the district court without discussion.

The district court also based its conclusion that there was no coverage under the policy, on the long-standing federally established rule that the assured under a policy such as involved herein is under a continuing obligation, implied by law, not knowingly to permit the vessel to break ground in an unseaworthy condition. *Union Insurance Co. v. Smith*, 124 U.S. 405 (1888); *The Sea Pak, supra.* The law of England is the same. Its Marine Insurance Act, 1906, 6 Edw. 7, c41, Section 39 (5) provides:

> "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of

> the adventure, *but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.*" (Emphasis added)

"There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, . . ." *Queen Ins. Co. v. Globe Ins. Co.*, 263 U.S. 487, 493.

Petitioner seems to claim, nevertheless, that the implied warranty [duty], clearly established under American and British law, is abrogated so far as Louisiana is concerned, by R.S. 22:628. It is doubtful that the legislature of Louisiana would have the power to repeal an established rule of Federal law. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310.

However, it does not appear that the legislature of Louisiana has attempted to do any such thing. R.S. 22:628 is contained in Part XIV of the Louisiana Insurance Code. The first section of that Part, R.S. 22:611, reads in part:

> "§ 611. Scope of Part
>
> The applicable provision of this Part shall apply to insurances other than ocean marine and foreign trade insurances . . ."

The term "ocean marine insurance" is not defined in the Louisiana Insurance Code. Therefore, there being no holding to the contrary by the courts of Louisiana, it is submitted that the term should be given its ordinary meaning. The term is defined in the "Dictionary of Marine Insurance Terms", by Robert H. Brown, 2nd Ed. 1964, Witherly & Co. Ltd., 15 Nicholas Lane, London, E.C. 4, at page 226:

"Ocean Marine Insurance

American expression used to define pure marine insurance on ships, cargoes and allied interests as distinct from inland marine insurance."

Accordingly, under the usual definition of "ocean marine insurance" R.S. 22:628 has no application to insurance on a tug such as involved in the present case.[2] If, notwithstanding, R.S. 22:628 were to be considered as applying to "ocean marine insurance" on tugs, then for it to affect the present case, the phrase "agreement in conflict with, modifying, or extending the coverage" would have to be construed as including judicially established rules with respect to ocean marine insurance, which rules would be invalidated unless printed in the policy. It is to be doubted that this was the intention of the Louisiana legislature.

CONCLUSION

The decision below was based on clearly correct findings of fact, and the correct application of well established rules of law; there was no dissent in the Court of Appeals; the decision does not conflict with any decision of a Court of Appeals for another Circuit, and there has been no show-

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2 The Louisiana Insurance Code has been held applicable to public liabilities insured under an ocean protection and indemnity (not here) policy. This, for the very limited purpose of making applicable the Louisiana Direct Action Statute, which, by its terms, applies to every "policy or contract of liability insurance". (*Coleman v. Jahncke Service*, Inc.) 341 F.2d 956 (CA 5-1965), reh. den., 348 F2d 868, cert. den. and dism., 382 US 967, 974 (1966). The policy involved here is not one of liability insurance, but one insuring against physical loss or damage to the insured vessel. It is of interest and pertinent to the district court opinion below to note that the district court in *Coleman v. Jahncke* (supra) found "the Claribel unseaworthy in having neither a properly calibrated compass nor a crew competent to use one". This finding was affirmed by the Court of Appeals.

ing that a state statute applies to bring about a different result.

The case presents no question warranting certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's brief has been served by mail upon William Stone, Suite 2120 225 Baronne Street Building, New Orleans, La. 70112 Attorney for Petitioner herein, this 31st day of August, 1973.

Benjamin W. Yancey

Francis Emmett
Attorneys for Respondent